SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1968

No. 318

VANCE TRUCKING COMPANY, INC., AND ALLSTATE INSURANCE COMPANY, PETITIONERS,

versus

CANAL INSURANCE COMPANY, FORRESTER TRUCKING COMPANY, INC., HERBERT FRANCIS CARSON, SCOTT CARSON, SUSAN CARSON, DAVID CARSON, CHRISTOPHER CARSON, AND ROBERT H. CARSON, ADMINISTRATOR OF THE ESTATE OF ANNIE BARBARA CARSON, DECEASED, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioners, Vance Trucking Company, Inc. and Allstate Insurance Company, pray that a writ of certiorari issue to review the decision of the Court of Appeals for the Fourth Circuit entered May 7, 1968.

OPINIONS BELOW

The order of the District Court dated January 6, 1966, is reported at 249 F. Supp. 33 and is printed in the Appendix at page 13. The order of the District Court dated

March 9, 1966, is reported at 251 F. Supp. 93 and is printed in the Appendix at pages 36, 37. The opinion of the Court of Appeals, No. 10,669, 4 Cir., May 7, 1968, is printed in the Appendix at page 34. The order of the Court of Appeals denying rehearing, dated June 20, 1968, is printed in the Appendix at page 42.

JURISDICTION

The decision sought to be reviewed was filed May 7, 1968. The jurisdiction of this Court to review this decision by writ of certiorari is conferred by 28 U. S. C., § 1254 (1) (1958).

QUESTION PRESENTED

Is the decision of the Court of Appeals requiring proration of insurance in the absence of co-insurance of the same risk in conflict with the applicable law of the State of South Carolina?

A subsidiary question comprised herein is:

Does the decision of the Court of Appeals impair obligations of contract in violation of Article 1, § 8 of the Constitution of South Carolina?

CONSTITUTIONAL PROVISION INVOLVED

(Code of Laws of South Carolina, 1962, Vol. 16, p. 21), Article 1, § 8, Constitution of South Carolina.

> "§ 8. Attainder; *ex post facto* law; impairment of contracts; titles; effect of conviction.—No bill of attainder, *ex post facto* law, law impairing the obligation of contracts, nor law granting any title of nobility or hereditary emolument, shall be passed, and no conviction shall work corruption of blood or forfeiture of estate."

STATEMENT OF CASE

This declaratory judgment action was instituted on June 19, 1963, in the United States District Court for the District of South Carolina, under 28 U. S. C., §§ 2201 and 2202, jurisdiction being based upon 28 U. S. C., § 1332 (a) (1). The complaint sought a determination of the rights and obligations of two trucking companies and their insurers with regard to claims for wrongful death and bodily injuries resulting from an accident that occurred on October 4, 1962.

The case was tried in the non-jury term of District Court on December 8 and 9, 1965, and by order dated January 6, 1966, the District Court held that the operator of the tractor-trailer involved in the accident was the agent of both Vance Trucking Company and Forrester Trucking Company. On March 9, 1966, the District Court issued its further order holding that the operator of the tractor-trailer was not insured by either insurance company; that Allstate Insurance Company insured Vance Trucking Company only; that Canal Insurance Company insured Forrester Trucking Company only; and that as the Allstate limit of coverage as to each person was $500,000.00 and the Canal limit as to each person was $100,000.00 Allstate must bear pecuniary responsibility of five-sixths and Canal Insurance Company one-sixth of the amount of any judgment suffered. (Curiously, although multiple claims are involved the District Court disregarded the aggregate limits of the policies, $500,000.00 on the part of Allstate and $300,000.00 on the part of Canal, when assessing the proportionate responsibility.)

Although on almost the same day that the District Court issued its latter order the South Carolina Supreme Court rendered a decision in *Galloway v. Southern Farm Bureau Insurance Co.*, 247 S. C. 288 (1966), in which the

South Carolina Court said that co-insurance of the same risk is prerequisite to the right of contribution among insurers, the Court of Appeals for the Fourth Circuit affirmed the order of the District Court. And although subsequent to the oral arguments in the Court of Appeals and prior to the decision of that court the South Carolina Supreme Court rendered a decision in *Travelers Insurance Co. v. Allstate Insurance Co.*, 155 S. E. 591 (S. C. 1967), holding that a liability insurance carrier only contracts to pay any debt the insured is liable to pay, the Court of Appeals denied appellants' petition for rehearing.

Thereafter the Court of Appeals granted petitioners' motion for stay of mandate, provided that petition for writ of certiorari was filed within 30 days from June 20, 1968.

ARGUMENT

Although the applicability of the principles enunciated in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938), has been by later decisions restricted [1], we are here dealing with the construction of insurance contracts performable in South Carolina and the substantive law of that state would clearly apply.

Petitioners are no longer contesting the judicial determination that the tractor-trailer driver was insured by neither Allstate nor Canal and was the common agent of both Vance Trucking Company and Forrester Trucking Company; and that Allstate insured Vance only and Canal insured Forrester only. As the District Court said in this connection [2]:

> "The applicable endorsements effectively negate duplicated coverage. Neither trucking company can claim coverage under any policy other than that in

[1] See 17 S. C. Law Quarterly (1965), pp. 467-505, *Erie v. Tompkins Revisited.*

[2] 251 F. Supp. at 98; Appendix p. 38.

which it is the named insured. We have two separate lines of coverage which, in this instance, happen to reach a single act. There is a duality of coverage without a duplication. Each trucking company is concurrently liable and each must look to its own insurer."

Petitioners contend that the applicable law of South Carolina was enunciated by the Supreme Court of that state in *Galloway v. Southern Farm Bureau Insurance Co.*, 247 S. C. 288 (1966), and *Travelers Insurance Co. v. Allstate Insurance Co.*, 155 S. E. 591 (S. C. 1967); however, in the decision of the Court of Appeals the pertinent language of the *Galloway case* was discarded as *dicta*, and in denying the petition for rehearing the *Travelers case* was apparently, in effect, ignored.

In *Galloway v. Southern Farm Bureau, supra*, the South Carolina Supreme Court expressly said that co-insurance of the same risk is a prerequisite to the right of contribution among insurers. In that case Galloway, who was injured when the automobile in which he was riding as a guest and which was a family purpose automobile owned by Tolson with whose permission it was being operated by Wilkes, overturned; and Galloway obtained a judgment against Wilkes in the amount of $100,000.00. Toward the judgment Tolson's insurer paid its limit of $10,000.00 and Southern Farm Bureau, which provided omnibus coverage to Wilkes, likewise paid its limit of $10,000.00. Wilkes was also covered under the omnibus clause of a second policy issued by Southern Farm Bureau, however, and Southern Farm Bureau contended that since Wilkes had other insurance under the first policy its liability was discharged by the payment made thereunder.

The trial judge held, and the Supreme Court affirmed, that as the judgment exceeded the coverage of all three policies Southern Farm's liability had not been discharged

by the single payment. Particularly apposite to the case at bar the court said [8]:

> "Appellant may not, and indeed does not, invoke the *pro-rata* provision of the 'other insurance' clauses with respect to Tolson's policy, because that policy was the primary coverage and liability thereunder was not on a parity with liability under appellant's policy, which was excess insurance, was not identical in scope with the former, and did not come into operation until the former had been exhausted. *Coinsurance of the same risk is prerequisite to the right of contribution among insurers. Laurens Federal Savings and Loan Ass'n v. Home Insurance Co. of New York,* 242 S. C. 226, 227, 130 S. E. (2d) 558; 29 A Am. Jr., Insurance, Sections 1715, 1717. Its contention that the court erred in not applying the pro-rata clauses with respect to its two policies (S 942964 and S 907980) issued to C. A. Wilkes is obviously devoid of merit because, although all other valid and collectible insurance (the Tolson policy and appellant's policy No. S 942964) has been paid and applied on the judgment for respondent's injuries, there remains unpaid of that judgment an amount greater than the coverage under Policy S 907980 upon which this action was brought." (Emphasis added.)

Even if the language of the South Carolina Supreme Court were *dicta* and even if the position which petitioners assert were not implicit from an overall reading of the decision in the *Galloway case,* there cannot, we submit, be any doubt but that the decision of the court below is directly in conflict with the decision of the South Carolina Supreme Court in *Travelers Insurance Co. v. Allstate Insurance Co., supra.* In that case the plaintiff had obtained a verdict in the amount of $25,000.00 jointly against several defendants, two of whom were insured by Travelers and one by Allstate. Counsel for the plaintiff then enforced collection of

[8] 247 S. C. at 292.

the entire judgment against Travelers, and the latter instituted action against Allstate to require contribution in an amount equal to one-half of the judgment. The lower court sustained a demurrer to the complaint, and in affirming the Supreme Court said[4]:

> "Throughout this case each insurance carrier is in the same legal position as its insured. A liability insurance carrier only contracts to pay any debt the insured is liable to pay. * * *. The obligation of the insurance carrier is established by contract and cannot be changed by this court[5] or even by the General Assembly since Article 1, Section 8, of the South Carolina Constitution forbids the Legislature to enact any law impairing the obligation of contracts.
>
> "The Legislature could by statute change the substantive law of this State as relates to the obligations of joint tort feasors and could provide for contribution; and this court might accomplish the same purpose by overruling its previous decisions. But the obligation of insurance carriers as established by contract may not be changed without first altering the rights and obligations of the parties they insure. * * *. Bessinger cannot be made to pay under the substantive law of this State and Allstate has never contracted to protect anyone else. Any other ruling would, in effect, make a new contract for the parties."

Thus, applying the law of South Carolina as enunciated by its Supreme Court, Vance Trucking Co., thus Allstate, may be required to pay all of any judgment rendered against Vance, regardless of the fact that the judgment may also be jointly against Forrester Trucking Company,

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[4] 155 S. E. (2d) at 593.

[5] It is to be noted that unlike the Federal rule as set forth in Tidal Oil Co. v. Flanagan, 263 U. S. 444 (1924), the South Carolina Supreme Court imposes upon itself the same prohibition against the impairment of the obligation of contracts as is imposed upon the General Assembly by Article 1, § 8 of the South Carolina Constitution. It would appear from Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938) that federal courts passing upon questions of state law would be subject to the same restriction.

or any portion thereof that the plaintiff may choose to enforce against Vance, thus Allstate. By the same token, Forrester, thus Canal, may be required to pay all of any judgment rendered against Forrester, regardless of the fact that the judgment may also be jointly against Vance, or any portion thereof that the plaintiff may choose to enforce against Forrester, thus Canal.

Furthermore, as was held in *Johnson v. Atlantic Coast Line Railroad Co. et al.*, 142 S. C. 112 (1927), although actual damages may not be apportioned between master and servant when liability is predicated solely upon *respondeat superior*, punitive damages may be apportioned in such case. It would follow in our present situation wherein the liability of Vance Trucking Co. and Forrester Trucking Co. results from the acts of their common agent, Burgess, any judgment for actual damages against Vance and Forrester must be joint or in like amounts as to each. However, the jury could render separate verdicts of like amounts for actual damages against the two defendants, and if the jury awarded punitive damages such awards would likely be several and in different amounts depending upon the relative wealth of the defendants.*

Summarizing, if neither Vance nor Forrester were insured a joint verdict against them could be enforced in whole or in part against either of them at the will of the plaintiff. If the verdict for actual damages were awarded severally or if a verdict for punitive damages were apportioned the judgment could be enforced against Vance and Forrester, respectively, only in the amounts prescribed

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* The only tort claim that has been reduced to judgment as of this date is the Wrongful Death action which resulted in a judgment against the two trucking companies jointly in the sum of $85,000.00, actual damages (Appendix, p. 43). However, the holding of Travelers Insurance Company v. Allstate Insurance, 155 S. E. (2d) 591 (S. C. 1967) would still apply, and the remaining five claims for damages resulting from bodily injury may yet result in separate or apportioned verdicts.

by the jury. The Court of Appeals has held that Allstate provides no coverage to Burgess, the common agent, or to Forrester. Allstate insured Vance only. And as the South Carolina court said, "[E]ach insurance carrier is in the same legal position as its insured." Accordingly, to require Allstate to pay any more or any less toward any judgment than could be required of Vance itself would constitute an impairment of the obligations of its contract, in violation of the Constitution and law of the State of South Carolina.

Anticipating opposition to this petition along the tenor that this is an isolated case which merely involves the property rights of the private parties to this suit petitioners, particularly Allstate, submit that problems concerning proration of coverage between multiple insurers are among those most pressing to the industry, and the Court is respectfully requested to take jurisdictional notice of the great abundance of litigation in this regard. Thus, far more important than the immediate pecuniary result to the parties hereto is the fact that a precedent will have been established which will be controlling at least in the Federal Courts of the District of South Carolina and which is patently inconsistent with the precedent established by the South Carolina Supreme Court in *Travelers,* controlling in the State Courts of that State. Indeed, it is reasonable to anticipate that if this conflict of authority is allowed to remain insurance companies would be prudent when similar situations arise to choose between the State and Federal Court on the basis of which decision is more favorable in the particular instance, then will often have to race to trial in effort to obtain a judgment before a judgment may be obtained in an action instituted by its opponent in the other court, in instances when jurisdictional prerequisites are such that the same action may be maintained simultaneously in the State and Federal Courts.

Furthermore, we are here not only dealing with a court of appeals decision in conflict with state law, but with a decision affirming a judgment of the United States District Court for the District of South Carolina which violates the Constitution of that state; and petitioners earnestly contend that the sanctioning of such a judgment by the lower court calls for an exercise of this Court's power of supervision.

CONCLUSION

The decision of the court below decides an important question of substantive law in a way that is in conflict with the applicable law of the State of South Carolina; and the decision of the court below sanctions a judgment of the District Court which impairs the obligations of contract, in violation of Article 1, § 8 of the Constitution of South Carolina as that provision is construed by the Supreme Court of that state. Petitioners, therefore, submit that a writ of certiorari to the Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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United States District Court, D. South Carolina, Greenville Division

January 6, 1966.

Declaratory Judgment action arising out of the collision in October, 1962, in Sumter County, South Carolina, when a large tractor-trailer unit crossed into the wrong side of the road and collided headon with an approaching passenger vehicle causing the death of one of the passengers and serious injuries to other occupants of such vehicle. The tractor and the trailer were owned by Forrester Trucking Company, Inc., sometimes hereinafter referred to as Forrester, a South Carolina corporation, and the tractor was driven at the time by its employee Sammie Burgess. Both the tractor and the trailer were used on the day of the accident in the delivery of tobacco by Vance Trucking Lines, Inc., sometimes hereinafter referred to as Vance, the use of the tractor being pursuant to a written lease between Vance as lessee and Forrester as lessor.

The principal point for determination in this action is the agency of Sammie Burgess, the driver. Each of the trucking companies contends that he was the agent of the other at the time of the collision. Counsel for the plaintiff in the wrongful death action and the other parties sustaining injuries contend that Sammie Burgess was the agent, or servant, of both.

A determination of the question of agency in this action will not only resolve questions of coverage but will be *res judicata* as to the same question in the death action now pending against both trucking companies and in other suits that may follow by the other persons injured in the collision, all of whom are made parties to this action. For this reason, the death action has been continued until this action is decided. It appears to be conceded that the liability for the wrongful death and personal injuries to third persons is clear. The question of damages, however, remains to be determined, and this should follow the determination in this action.

Depending upon the resolution of the question of agency, the interpretation of the respective contractual liabilities of Vance's insurer, Allstate Insurance Company,

and Forrester's insurer, Canal Insurance Company, must be made.

Forrester has limits of liability of $100/300,000, and Vance has liability limits of $300/500,00.[1] There is possibility that one or more of these claims may exceed one of these policy limits.

Vance and Forrester each disclaim legal liability for the actions of Sammie Burgess and seek to place the responsibility on the other. Each emphatically denies that it had control or dominion over Sammie Burgess. Taking the testimony and contentions of each at face value, the Court would have to conclude that Sammie Burgess was without any principal.

[1] The resolution of the factual determination must be made not merely from the written agreement between the parties, but also from the facts and circumstances surrounding their continuing relationship, as well as the facts and circumstances at the time of the traffic accident. *Tate v. Claussen-Lawrence Construction Co.*, 168 S. C. 481, 167 S. E. 826. See also *Hutson v. Herndon*, 243 S. C. 257, 133 S. E. (2d) 753, 756.

Vance is a licensed carrier operating under Interstate Commerce Commission authority. Forrester is an intrastate carrier licensed under the authority of the South Carolina Public Service Commission.

During the tobacco hauling season, it appears that Vance would enter into agreements with Forrester pursuant to which Forrester would make available to Vance tractor-trailer units with drivers. A written agreement dated July 15, 1962, is in evidence under which Forrester undertook to lease to Vance "vehicles listed in this agreement." The agreement does not list or describe any equipment, but the parties are in accord that the tractor involved in the accident was one of the units subject to the lease agreement. The trailer appears to have occupied a somewhat different status as will be discussed below.

While the drivers furnished by Forrester were engaged in hauling tobacco, they would clearly be under the control

[1] See the excellent note by Wilkins, Federal Civil Procedure—Discovery of Existence and Amount of Defendant's Insurance Policy, 17 S. C. Law Rev. 750 (1965).

of Vance and subject to the direction of Vance. At the end of a particular day's hauling, the driver of a Forrester truck could call Forrester for instructions or could return to the Vance terminal or could return to the Forrester terminal at Sumter. If a leased unit were returned to the Forrester terminal at Sumter, such unit and the driver could be used by Forrester in its own private business. The tractor involved in the collision was described as a "base unit" by a witness for Forrester who also said that Vance had priority as to this tractor since Forrester's hauling was slow during this period. On the other hand, it appears that any particular tractor-trailer unit and driver could be recalled by Forrester and another one substituted and, in fact, Sammie Burgess on October 3, 1962, the day preceding the accident, went on a trip with a load of cotton for Forrester.

Under the written lease, Vance and Forrester divided the gross revenues received by Vance for the hauling of tobacco on a 80/20 ratio, with Forrester receiving 80 per cent of the revenue and paying for gasoline and other expenses incident to the carrying of commodities.

It was frankly admitted and appears obvious that it was to the mutual interest of both Vance and Forrester to utilize the driver and tractor-trailer to a maximum as this would result in a maximum revenue to each of them. In other words, the lease arrangement between the parties was not one whereby the lessee was given exclusive custody of the leased property but rather was one whereby either the lessor or the lessee could use the property with both parties benefiting economically from the maximum use by the lessee.

It is also clear that the written lease did not cover the full arrangement between Vance and Forrester. There is no evidence that the trailer involved in the collision was subject to the lease. On the contrary, it appears to have been an extra trailer which Vance had been furnished by Forrester. Forrester likewise also furnished an extra tractor for use as a yard tractor and sent a man to Lake City just to load. The record is silent as to the agreement between Forrester and Vance respecting these matters. The officer who testified for Forrester knew of no agreement for

compensation for either the tractor or the trailer. The inference is clear that both parties cooperated fully toward the end that Vance would be able to handle and transport a maximum amount of tobacco with the resulting joint benefit to each company. The joint or common relationship between the parties is further demonstrated by the manner in which payments were handled. Although Forrester was liable under the lease agreement for payment of gas, as the matter was handled in actuality, gas purchases were made by Forrester and charged to Vance and paid by Vance. These payments were deducted by Vance from Forrester's share of the revenue. Furthermore, Vance collected for its transportation only upon receipt from Forrester of a bill lading bearing the receipt of the consignee. This was handled procedurally as follows:

> When a Forrester truck and driver made a delivery for Vance to a Vance customer, this customer would sign a receipted bill of lading and deliver it to the Forrester employee. He, in turn, would deliver this receipted bill of lading to Forrester who, in turn, would mail it to Vance. This was Forrester's only method of keeping an account of the revenues derived by its units. On some occasions, this receipted bill of lading would be returned to Vance directly, but would not be delivered to Vance until another receipt showing substantially the same information as the bill of lading was delivered by Vance to the Forrester driver.

Drivers' logs kept in compliance with the requirements of the Interstate Commerce Commission were likewise delivered by the drivers first to Forrester who relied upon the same for information for its records and who then transmitted the logs to Vance in accordance with its lease agreement.

When a Forrester driver would return to the Vance terminal at Lake City, he could be requested by Vance to make another delivery. If there was no further load available, the driver would be on his own to return to Sumter or would be free for the rest of the day. On some occasions, the drivers would leave their tractor-trailer in Lake City and go without it to Sumter. The yard tractor was available

for use and was used with the consent of Forrester for this purpose from time to time.

On the day of the fatal accident, Sammie Burgess had returned in the afternoon around 5 or 5:30 to the Vance terminal in Lake City, South Carolina. He had made a delivery of tobacco to Fairmont, North Carolina, and had in his possession the receipted bill of lading. This was toward the end of the tobacco season, and the dispatcher for Vance advised him that he did not have any further business for him. According to the dispatcher, Burgess was told that he could go in and that the dispatcher would get in touch with Mr. Forrester later. According to Sammie Burgess, the dispatcher said that he could go on into Sumter and that if he had another load, he would let Sammie's company know. At that time, Sammie Burgess was instructed by the Vance dispatcher to return to Forrester the extra trailer.

Sammie Burgess appears to have been paid by Forrester on a commission basis with extra compensation for nights when he "laid over" away from home.

[2] The collision occurred around 7:20 P. M. while Sammie Burgess was on the way from Lake City to Sumter. At the time of the accident, he was carrying the receipted bill of lading and also the Interstate Commerce Commission logs. This was clearly for the benefit of both parties. He was returning the spare trailer to Forrester. As mentioned before, there was no indication that this trailer was leased under the written agreement. In any event, the furnishing of the trailer by Forrester to Vance was obviously designed to serve their mutual benefit. There was no evidence as to the agreement for re-delivery of the trailer. In absence of agreement specifying the place of re-delivery, it has been held that where the parties reside a reasonable distance from each other, the property should be returned to the residence of the person furnishing the same. Whether this rule is applied or not, there would be an obligation on the part of Vance to keep the trailer in a reasonably safe and suitable place. 8 Am. Jur. (2d), Bailments, § 171. Thus, it was for the benefit of Vance that the trailer be returned at the earliest convenient time and this, of course, also bene-

fited Forrester in its further use of the trailer. It was also to Forrester's benefit that Sammie Burgess return to Sumter.

In *Jackson v. Blue,* 152 F. (2d) 67 (4th Cir. 1945), a truck had been leased with its driver for the purpose of hauling a bulldozer. It appeared that the lessor had agreed to purchase the bulldozer which was being hauled after the work of the lessee had been completed. At the time of the accident, the bulldozer was being delivered to one to whom the lessor had leased it in pursuance to his contract to purchase the machine. The Court said:

> "It is obvious that at the time of the accident the transportation of the bulldozer was being carried on both for the benefit of the Pool [lessee] in the performance of its obligation and for the benefit of Highway Equipment [lessor] in the delivery of the machinery to the new lessee * * *. [T]here was no error in the instruction to the jury that Highway Equipment should be held liable if they should find that to some extent it was in control of the driver of the tractor-trailer, and the evidence justified the finding that the journey * * * was the joint enterprise of Highway Equipment and the Pool, and that the driver was acting for both of them in taking the bulldozer to the place where it was needed." 152 F. (2d) at 71-72.

[3] The test of agency generally and in the State of South Carolina is said to be determined by deciding who has the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment. *Hutson v. Herndon, supra; Brownlee v. Charleston Motor Express Co., Inc.,* 189 S. C. 204, 200 S. E. 819, 824.

Who then had the right to control Sammie Burgess? Again, this question cannot be discussed in a vacuum apart from practicality. Obviously, any agent driving a motor vehicle as soon as he is out of sight of the employer is not, as a practical matter, subject to his direction and control. The real question it seems in this case is, "To whom would Sammie Burgess respond if a direction had been given to him after he had left the terminal?" For example, suppose

that after he left the terminal, returning to Sumter, an employee of Vance had hastened after him with the request that he return to Lake City and make a late shipment. Under the lease arrangement between the parties and the relationship previously outlined, the conclusion is inescapable that Sammie Burgess would have acceded to this direction from Vance and returned to Lake City. On the other hand, suppose that an official of Forrester Trucking, having learned of Sammie Burgess's departure from Lake City, had hastened in his automobile to intercept him and had directed him to return to Lake City or any other point for the purpose of working for Forrester. Again, the conclusion is inescapable that Sammie Burgess would have acceded to this direction. Under the arrangement between the parties, this is not an unnatural result, but rather, a natural one. As a matter of fact, each would have the right to direct Sammie Burgess at this particular time of the day and the only possible conflict that could arise would be in the event of Forrester and Vance issuing contrary instructions to Sammie Burgess at the same time.[2] As Judge Williams noted in *Edwards v. Rogers*, 120 F. Supp. 499, 503 (E. D. S. C. 1954): "• • • [T]he dividing line between the existence of liability and immunity • • • ordinarily lies in the right of the employer to control the acts of the agent at the time the tort is committed."

The testimony of Forrester's officer, however, was that there was no conflict in the instructions to the drivers of the leased equipment, and the Court is not called upon to imagine a hypothetical situation where such conflict might occur in the face of clear evidence that Sammie Burgess acted for the mutual benefit of Vance and Forrester. See *Baur v. Calic*, 166 Md. 387, 399, 171 A. 713, 719; *Grasberger v. Liebert & Obert Corp.*, 335 Pa. 491, 6 A. (2d) 925, 122 A. L. R. 1201; *Keitz v. National Paving & Contracting Co.*, 214 Md. 479, 134 A. (2d) 296, 301, 136 A. (2d) 229; *Maryland Casualty Co. v. Sause*, 190 Md. 135, 57 A. (2d) 801, 804.

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[2] Similar conflict was recognized long ago though on a different plane. Matt. 6:24. "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other."

[4-6] The principles respecting liability in this field are well summarized in *Siidekum v. Animal Rescue League*, 353 Pa. 408, 45 A. (2d) 59, 61, 62, as follows:

> By a continuous stream of authorities it has been declared that where one person lends his servant to another for a special employment the test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his general master or becomes subject to that of the party to whom he is lent or hired; the criteria is not whether the borrowing employer *in fact* exercises control but whether he has the *right* to exercise it. It is also well recognized that under some circumstances both the lender and the borrower may have control over the servant so as to render each of them liable for his conduct, for he may have been transferred to carry on work which is of mutual interest to them and to effect their common purpose, so that his service to the one does not involve abandonment of his service to the other. It is further established that, when different inferences can reasonably be drawn from the testimony as to whether the lender or the borrower is the controlling master at the time of the accident, or whether both of them have a right of control, the question is one for the jury." [Footnotes omitted.]

See also 56 C. J. S. Master and Servant § (2d)(2).

[7] The question here is for the Court to decide as there is no jury. In the case at hand, Sammie Burgess had not abandoned the service of Vance or his employer Forrester in making the trip from Lake City to Sumter. On the contrary, he continued to act for their mutual benefit and was subject to their joint control.

Great stress is laid by Forrester on the fact that a Vance decal was on the tractor at the time of the accident. This decal read as follows:

> "Operated by
> Vance Trucking Company
> Henderson, N. C.
> I. C. C. No. 93980
> N. C. No. 56"

Under 49 U. S. C., Section 304(e), the Interstate Commerce Commission is authorized to prescribe regulations governing the use of leased vehicles with exceptions being made by Subparagraph (f) denying the right to regulate the duration of any such lease or the amount of compensation to be paid for the use of the leased vehicle. Regulations have been promulgated under the authority of this section which, among other things, require a lessee to remove any legend or device showing it as the operating carrier before relinquishing possession of leased equipment. These regulations also require the lessee to secure from the owner of the leased equipment, or someone authorized to act for the owner, a receipt specifically identifying the equipment and stating therein the date and the time of day possession of such leased equipment was taken by the owner from the authorized carrier. *Ex Parte* No. MC-43, Title 49, Federal Register, Section 207. At the time of the accident in this case, no such receipt had been secured by Vance.

Section 304 of the Act mentioned above authorizes such regulations as are reasonably necessary to assure that the lessee will have full direction and control of leased vehicles and will be fully responsible for the operation thereof while they are being so used. Under Section 207 of the regulations mentioned above, the lease must provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of the lease, and such duration is required to be made specific in the lease and to coincide with the time for the giving of receipts for the equipment as required in the regulations, both at the beginning and end of the lease arrangement.

The lease between Vance and Forrester has no provision respecting exclusive possession, control and use or for the assumption of responsibility. With respect to duration, the lease provides that it is to remain in force until cancelled or superseded by another lease and that its terms and conditions apply only whenever lessor's vehicle is actually in the service of the lessee.

[8, 9] The failure to include the lease provisions required by the regulations in the particulars just mentioned

would certainly not excuse Vance from any responsibility it might otherwise have for the actions of the driver of the tractor-trailer; and, on the other hand, the responsibility of Vance would not serve to release Forrester if, in fact at the time of the collision in question Forrester also held a joint right of control over Sammie Burgess.

[10, 11] Vance contends that it is free from the duty to comply with the regulations because it was hauling "an exempt commodity." As mentioned before, the Interstate Commerce Commission may not regulate the duration of the lease of any vehicle or the amount of compensation to be paid for its use when it is engaged in hauling so-called exempt commodities referred to in 49 U. S. C. § 304 (f). Except for these two exceptions, however, all of the regulations governing the use of leased vehicles are applicable without regard to the commodity being hauled. The Interstate Commerce Act and the regulations issued thereunder obviously are not designed to excuse a party from liability which he might otherwise have. Thus, a determination that Vance is responsible under the Act and regulations does not preclude a finding that Forrester was also responsible. The fact that no receipt had been taken for the possession of the Vehicle at the time of the collision and the fact that the Vance decals were still upon the tractor are matters to be considered in an overall consideration of the relationship between the parties. A decision based on a consideration of all relevant factors that Sammie Burgess was the agent of both Vance and Forrester makes it unnecessary to consider whether Vance in any event would be responsible solely because of the Interstate Commerce Act and regulations.

The question of "proportionate pecuniary responsibility" was not argued so no decision is being made thereabout. However, the parties are not foreclosed from presenting this issue at a later time should they be so advised.

The Clerk will enter Judgment reflecting that both Vance and Forrester, and their insurers, must defend in the tort action which precipitated this controversy. Liability rest upon both.

And it is so ordered.

United States District Court, D. South Carolina, Greenville Division

March 9, 1966.

Plaintiff and defendant insurance companies, by cross motions and oppositions to same, seek this forum's decision as to their individual or collective obligations to their named insured and others. The determination is whether coverage is properly classified as primary and secondary—excess, or concurrent and *pro rata*. Allstate insists that Canal has primary responsibility protecting both Vance, Allstate's insured, and Forrester, Canal's named insured. Canal urges *pro rata* responsibility. Each relies on policy inclusions and exclusions of both as dissected together and separately.

This Court's review was had on December 8 and 9, 1965, in a declaratory action arising out of an automobile-truck collision in October, 1962, in Sumter County, South Carolina. Crucial to decision was determination of the agency of the driver of the truck, each of two trucking companies, Vance Trucking Lines and Forrester Trucking Company, contending that the driver was the agent and servant of the other at and before the time and place of the collision. This Court's order held that Vance and Forrester both had supervision of the driver at the time of the accident, that both were therefore liable. This order decided that both Allstate and Canal, insurers for Vance and Forrester respectively, would have to defend tort actions arising out of the accident. The question of the pecuniary responsibility of Allstate and/or Canal was not an issue then.

Subsequent to initial determinations, both Allstate and Canal filed motions [1] to have the order amended to declare the rights, duties, obligations and legal relations of the parties under the respective terms of their policies, especially as relates to pecuniary responsibility. Allstate has asked the court to find that its policy, issued to Vance, does

[1] Rule 59(e) Federal Rules of Civil Procedure was pursued (by agreement and by stipulation) which reads:

> Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

not extend coverage to Burgess, the driver, or Forrester, but that the policy of Canal provides coverage to Vance, Forrester and the driver. Canal asks that the court determine the proportionate pecuniary responsibility of the insurers in relation to their respective coverages and the factual determinations heretofore made by the court. The matter is before the court under Rule 59(e), Federal Rules of Civil Procedure, but, aside from that, the parties have stipulated that it is properly before the court.

Basically, this is a controversy between two insurance companies over their related, or unrelated, obligations to their named insureds and others. In other words, is the coverage of one company primary and the other secondary and excess, or are the coverages concurrent and *pro rata*? Allstate submits that Canal's coverage is primary and protects Vance, Allstate's named insured, Forrester, Canal's named insured, and Burgess, the driver. Canal urges *pro rata* liability in asking the court to determine the "proportionate" responsibility of the parties. Both companies rely upon varying policy inclusions and exclusions in an effort to obtain the desired result.

[1–3] Policy construction is imperative here since parties may contract to extend or limit insurance liability risks as they see fit. Thus, the issue here—the coverage of liability insurance—must be determined from the contractual intent and objectives of the parties as expressed in their policies and applicable endorsements. *Fidelity & Cas. Co. of New York v. Reece,* 223 F. (2d) 114 (10th Cir. 1955); 7 Appleman, Insurance Law & Practice, section 7481; 45 C. J. S. Insurance §§ 827 and 829. The extent or limit of risks if unambiguous, must be taken in their ordinary and popular sense, and an insurer may not be compelled to assume liability which cannot be clearly said to be *within a fair* and reasonable interpretation of the contract. *Fidelity & Cas. Co. of New York v. Reece,* 223 F. (2d) 114 (10th Cir. 1955); *Farm Bureau Mut. Auto. Ins. Co. v. Daniel,* 104 F. (2d) 477 (4th Cir. 1939). The contentions of Allstate and Canal regarding their policies must be examined in this light.

Allstate would first focus all attention upon Canal's obligations but, while there may be no doubt about these obligations, the court cannot construe Canal's policy and delineate the obligations therein, without being simultaneously aware of Allstate's policy and the obligations there. It is not practical to consider either policy alone for it is apparent that both policies were written with the express thought that other insurance might be involved.

In attempting to provide for a comprehensive policy, it is a common practice to include extended coverage clauses in automobile liability insurance contracts. Because of this, duplications of coverage would often be found were it not for the further practice of setting forth exclusions to coverage. Such exclusions or limitations may take many forms and may be found in the body of the policy or in endorsements. Regardless of where they are posited, however, these exclusions and limitations have led to a substantial body of jurisprudence. See, *e. g.*, Annot., 76 A. L. R. (2d) 502; 7 Am. Jur. (2d) Automobile Insurance, section 202 (1963); 8 Appleman, Insurance Law & Practice, sections 4911, *et seq.*

Here, both Allstate and Canal have rather comprehensive policies and both seek to limit particular coverages by exclusions. The extent to which reliance is placed upon an exclusion is shown by the fact that both Allstate and Canal assert a particular exclusion as a basis for denying coverage to one person or company or another Allstate relies completely on its exclusionary endorsement 14B-1 to deny coverage to Forrester and the driver. The endorsement, in part, provides:

> With respect to the insurance for Bodily Injury Liability and for Property Damage Liability the unqualified word 'insured' includes the named insured and also includes any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. The insurance with respect to any person or organization other than the named insured does not apply:

(a) except with respect to an employee of the named insured, to any person or organization, or to any agent or employee thereof, engaged in the business of transporting property by automobile for the named insured or for others (1) unless the accident occurs while such automobile is being used exclusively in the business of the named insured and over a route the named insured is authorized to serve by federal or public authority.

* * *

Provided, however, a driver or other person furnished to the named insured with an automobile hired by the named insured shall not be deemed an employee of the named insured;

* * *

(d) with respect to any hired automobile, to the owner * * * of such automobile, or to any agent or employee of such owner * * *, if the accident occurs (1) while such automobile is not being used exclusively in the business of the named insured * * *.

Other Insurance—Coverage A and B: If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectable insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectable insurance.

Canal places no less reliance on its E-45 endorsement to deny coverage to Vance. Its endorsement provides:

In consideration of the premium charged for the policy to which this endorsement is attached, it is understood and agreed that no coverage is extended to any person, firm or organization using the described automobile pursuant to any lease, contract of hire,

bailment, rental agreement, or any similar contract or agreement either written or oral, expressed or implied, the terms and provisions of the Insuring Agreement III, entitled 'Definition of Insured' notwithstanding.

In the event the automobile described in this policy is being used or maintained pursuant to any lease, contract of hire, bailment, rental agreement or any similar contract or agreement, either written or oral, expressed or implied, the insurance afforded the named insured shall be excess insurance over any other insurance.

Allstate urges that because of the 14B-1 endorsement its policy offers no protection to Forrest or the driver since the court has already found that the truck was not exclusively about the business of Vance. Unquestionably, the exclusion serves its purpose here. Forrester and Burgess are not covered under Allstate's policy.

Conversely, Canal urges that because of the E-45 endorsement its policy affords no protection to Vance or the driver. Again, unquestionably, this exclusion serves its purpose. Vance and Burgess are not covered under Canal's policy.

[4] The controversy thus resolves itself to this: Allstate's policy protects Vance and Canal's policy protects Forrester. To escape this determination Allstate submits that the operation of the vehicle was not pursuant to the lease and, therefore, the E-45 exclusionary endorsement of the Canal policy would not operate to exclude from coverage "any person, firm or organization using the described automobile * * *." The Canal policy would then provide coverage for Vance and Burgess as well as Forrester, and the "other insurance" clause of the Allstate policy would then be of effect. That contention, however, is without merit. The order of this court which determined the relationship of parties drew no such conclusion. The lease was but one of several factors, but definitely not *the* controlling one, considered in that determination, but insomuch as the operation of the vehicle was of benefit to Vance it was obviously pursuant to the lease. In fact, the lease set forth the terms and methods of compensation and other matters

incident to the operation. That these provisions were in force and being followed is not questioned. It is the fact of the lease arrangement which created the concurrent responsibility, at a particular time and place, which so pervades this controversy. Moreover, the situation at hand, by any name, would clearly fall within the broad classifications contained in the endorsement.

There is no reasonable, plain and ordinary interpretation which may be applied to either policy to justify a finding that either insurer owes protection to anyone other than its named insured. This is not a case in which conflicting "other insurance" clauses are to be resolved. In those cases the controversy most often arises where there is a duplication of coverage. Where one party is covered by two insurance policies the conflict is usually resolved by a finding that one policy provides primary coverage and the other secondary coverage. The principles usually used in resolving these conflicts of "other insurance" clauses are summarized at 7 Am. Jur. (2d), Automobile Insurance, section 202 (1963):

> Many cases have arisen involving conflicts between insurance policies both of which purport to restrict or escape liability for a particular risk in the event that there is other insurance. Such conflicts have arisen, under automobile liability policies covering the same risk, in the following situations: (1) where one of the policies contains an 'excess insurance' clause and the other contains a '*pro rata*' clause; (2) where one of the policies contains an 'excess insurance' clause and the other a 'no liability' clause; (3) where both of the policies contains an 'excess insurance' clause; (4) where one of the policies contains a '*pro rata*' clause and the other contains a 'no liability' clause; and (5) where a 'no liability' clause expressly designates the types of insurance with which it might conflict.

That treatise further states that in the first situation the majority prefers the "excess" clause over the "*pro rata*" clause; that in the third situation *pro rata* contribution is generally required; that in the fourth situation the "no liability" clause is preferred over the "*pro rata*" clause;

and in the fifth situation the "no liability" clause is preferred over the "excess" clause. Such rules as these, formulated in the hopeful quest of some logical reconciliation, have been characterized as "pursuing a will o' the wisp," *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Or. 110, 341 P. (2d) 110, 346 P. (2d) 643, 76 A. L. R. (2d) 485 (1959), and have been rejected by many courts as a futile exercise.

> There reasoning appears to us completely circular, depending, as it were, on which policy one happens to read first. Other cases seem to recognize the truth of the matter, namely, that the problem is little different from that involved in deciding which came first, the hen or the egg. *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F. (2d) 958, 960 (9th Cir. 1952).

One thing is apparent, the jurisprudence is multitudinous, multifarious and, in many respects, oppressive. A general rule can only be found within a particular category, and there are contrary opinions in each category. It is no mean task to undertake a review of the jurisprudence, for each circumstance had received extensive treatment and, because factual situations are rarely exact in comparison, legal guidelines are barely discernible.[2]

This situation has led a growing number of courts to decline to attempt a reconciliation. Rather than pursuing the "will o' the wisp," circular reasoning, or the attempt to resolve the hopeless, these courts have rejected the conflicting "other insurance" clauses *in toto* as being mutually re-

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[2] See commentaries corresponding to the American Jurisprudence categorization at Annot., 76 A. L. R. (2d) 502 (1961); Annot., 46 A. L. R. (2d) 1163, 1165 (1956); Annot., 69 A. L. R. (2d) 1122 (1960); 46 A. L. R. (2d) 1163, 1167; 46 A. L. R. (2d) 1163, 1168, which, with later case supplementation, highlights the expansiveness of the problem.

[3] See, e. g., Liberty Universal Ins. Co. v. National Sur. Co., 338 F. 2d 988 (5th Cir. 1964); Gilkey v. Andrew Weir Ins. Co. 291 F. 2d 132 (9th Cir. 1961); Citizens Mut. Auto. Ins. Co. v. Fireman's Fund Ins. Co., 234 F. Supp. 931 (W. D. Mich. 1964); Allstate Ins. Co. v. Atlantic Nat'l Ins. Co., 202 F. Supp. 85 (S. D. W Va. 1962; Maryland Cas. Co. v. Continental Cas. Co., 189 F. Supp. 764 (N. D. W. Va. 1960); New Amsterdam Cas. Co. v. Certain Underwriters, 56 Ill. App. 2d 224, 205 N. E. 2d 735 (1965); Iowa Nat'l Mut. Ins. Co. v. Fidelity & Cas. Co. of New York, 62 Ill. App. 2d 297, 210 N. E. 2d 662 (1965); Farmers Ins. Exchange v. Fidelity & Cas. Co. of New York, 374 P. 2d 754 (Wyo. 1962).

pugnant, and have required proportionate, or *pro rata* responsibility. From a numerical, if not a jurisdictional, standpoint more recent cases have reached this result.[8]

The rule expressed in these cases has had its greatest following in Oregon and in decisions rendered by the Ninth Circuit based on Oregon law. Many of these cases have involved the situation in which one person was driving another's car and the ensuing conflict was between the insurers of the owner and the driver. See, *e. g.*, *Travelers Ins. Co. v. Peerless Ins. Co.*, 287 F. (2d) 742 (9th Cir. 1965); *General Accident Fire & Life Assur. Corp., Ltd. v. Continental Cas. Co.*, 287 F. (2d) 464 (9th Cir. 1961); *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F. (2d) 958 (9th Cir. 1952); *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Or. 110, 341 P. (2d) 110, 346 P. (2d) 643, 76 A. L. R. (2d) 485 (1959).

Although the rule may have been regarded as an Oregon rule, a review of the cases will reveal that it has been applied with increasing momentum in other jurisdictions as well. See *Continental Cas. Co. v. St. Paul Mercury Fire & Marine Ins. Co.*, 163 F. Supp. 325 (S. D. Fla. 1958); *Continental Cas. Co. v. Weeks*, 74 So. (2d) 367, 46 A. L. R. (2d) 1159 (Fla. 1954); *Continental Cas. Co. v. New Amsterdam Cas. Co.*, 28 Ill. App. (2d) 489, 171 N. E. (2d) 406 (1960); *New Amsterdam Cas. Co. v. Certain Underwriters*, 56 Ill. App. (2d) 224, 205 N. E. (2d) (1965); *Iowa Nat'l Mut. Ins. Co. v. Fidelity & Cas. Co.*, 62 Ill. App. (2d) 297, 210 N. E. (2d) 622 (1965); *Reetz v. Werch*, 8 Wis. (2d) 388, 98 N. W. (2d) 924 (1952); *Farmers Ins. Exchange v. Fidelity & Cas. Co.*, 374 P. (2d) 754 (Wyo. 1962). The rule has also been applied in the lessor-lessee situation. See *Liberty Universal Ins. Co. v. National Surety Co.*, 338 F. (2d) 988 (5th Cir. 1964); *Gilkey v. Andrew Weir Ins. Co.*, 291 F. (2d) 132 (9th Cir. 1961); *Citizens Mut. Auto. Ins. Co. v. Fireman's Fund Ins. Co.*, 234 F. Supp. 931 (W. D. Mich. 1964); *Allstate Ins. Co. v. Atlantic Nat'l Ins. Co.*, 202 F. Supp 85 (S. D. W. Va. 1962); *Arditi v. Massachusetts Bonding & Ins. Co.*, 315 S. W. (2d) 736 (Mo. 1958); *Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co.*, 28 N. J. 554, 147 A. (2d) 529, 69 A. L. R. (2d) 1115 (1959).

The problems of "other insurance" are but an enlightening adversion here, however, for we are not faced with such a problem. The applicable endorsements effectively negate duplicated coverage. Neither trucking company can claim coverage under any policy other than that in which it is the named insured. We have two separate lines of coverage which, in this instance, happen to reach a single act. There is a duality of coverage without a duplication. Each trucking company is concurrently liable and each must look to his own insurer. It follows that the measure of each insurer's response must be proportional to the amount of coverage each has provided. It does not appear that a factual situation sufficiently analogous to lend guidance has been decided by the courts, but, ultimately, the situation is not wholly dissimilar to the "other insurance" situation, and the result would be no different had there been a true duplication of coverage. By what is perhaps the majority view neither of the two "excess" clauses would be preferred and there would be required a proration. By the so called "Oregon" rule both clauses would be nullified and proration required. There is no other rational basis of application than a *pro rata* response.

Allstate has submitted several cases for consideration apparently with the thought that these cases are dispositive of the controversy here. However, an examination of the cases will show that they are not factually similar or are expressive of the supposed general rule in conflicting "other insurance" cases. Allstate urges a consideration of *American Surety Co. of New York v. Canal Ins. Co.*, 258 F. (2d) 934 (4th Cir. 1958), where an "excess" clause was given effect. In that case a lessee of a truck was covered as a named insured under American's policy and as an omnibus insured under Canal's policy. The American policy provided that it would furnish excess coverage as to hired vehicles. A similar Canal provision was to the effect that the policy would provide *pro rata* contribution if there were other insurance, with a proviso, however, that with respect to "temporary substitute automobiles" or "other automobiles" it would furnish only excess coverage.[4] This provision was

[4] See American Surety Co. of New York v. Canal Ins. Co., 157 F. Supp. 386, 389 (W. D. S. C. 1957) rev'd 258 F. (2d) 934 (4th Cir. 1958).

held not applicable because as to Canal's named insured the truck was neither a "temporary substitute" nor an "other automobile." The excess clause of the American policy could be given effect without invalidating the *pro rata* contribution clause in the Canal policy because the *pro rata* clause could operate in those situations where the other insurance was not excess. As the case is readily distinguishable on its facts from the present controversy it is not deemed controlling here.

Likewise not applicable is *Carolina Cas. Ins. Co. v. Pennsylvania Thres. & Farmers' Mut. Ins. Co.*, 327 F. (2d) 324 (3rd Cir. 1964). There, Allison, an ICC carrier, owned certain vehicles and was insured by P.T. & F. Kuhn Transportation Company, also an ICC carrier, owned certain vehicles and was insured by Carolina. The facts leading to a coverage controversy were that Allison, who had about half a load, called Kuhn to ask if he had anything to be delivered in the same area as Allison's goods. There was no written lease of the vehicle to Kuhn and, though Kuhn had leased in the past from Allison, the testimony was that this was a different arrangement. The driver, an employee of Allison, testified that he obtained all of his instructions from Allison. After an accident occurred, P. T. & F. asserted that Carolina, Kuhn's insurer, had primary coverage because there was an oral lease of the vehicle and because Kuhn was required by the Pennsylvania Utility Commission to stand liable to the public. The district court found that there was no lease agreement and that Kuhn had simply hired Allison to haul certain goods to two customers.

The policies of both P. T. & F. and Carolina were identical and each contained identical endorsements of the 14B-1 type which Allstate has here. The driver was specifically excepted from P. T. & F.'s exclusion since it provided, as does Allstate's here, that "a) except with respect to an employee of the named insured," no insurance is afforded any other person or organization. Aside from that, however, the exclusionary endorsement would not have helped P. T. & F. because under the terms of the endorsement, it only applied where *another* person or organization was "engaged in the business of transporting property by automo-

bile for the named insured." Kuhn was not transporting property for Allison. Thus, as the Third Circuit held, Carolina's exclusion applied but P. T. & F's did not, and P. T. & F. was therefore held primary. In this respect, the decision is not unlike that of the Fourth Circuit in *American Surety Co. of New York v. Canal Ins. Co.*

Allstate also refers to cases cited in the *Carolina* case and thereby urges consideration of these as support. There are five cases cited in the *Carolina* decision, including *American Surety Co. of New York v. Canal Ins. Co.* which has already been considered, but none of these is determinative of the case here. In *Nationwide Mutual Ins. Co. v. Fidelity & Cas. Co.*, 188 F. Supp. 377 (W. D. Pa. 1960) rev'd 286 F. (2d) 91 (3rd Cir. 1961), a case in which three insurers were involved, all with similar "other insurance" clauses, the district court merely held that, under the varied facts of the case, it could not hold that Nationwide should be absolved. The court expressed no opinion on whether or not Nationwide might eventually get out. In reversing this decision, the Third Circuit held that the district court should have refused to entertain the action initially and that it was error to have directed Nationwide to defend. The other cases, expressly stating the Pennsylvania rule, do no more than follow the supposed general rule for resolving conflicting "other insurance" clauses.

The cases advanced are not factually or legally apposite, nor are they inconsistent with *pro rata* apportionment here. Allstate and Canal are liable concurrently and in proportion to the amount of insurance provided by each. Since, as to one person, the Allstate policy provides coverage to the limit of $500,000.00 and the Canal policy provides coverage to the limit of $100,000.00, Allstate must bear pecuniary responsibility of five-sixths and Canal must bear one-sixth of the amount of any judgment suffered, with the proration to be applied in like manner to the expense of defending the suits.

And it is so ordered.

OPINION OF THE COURT OF APPEALS

May 7, 1968.

BOREMAN, Circuit Judge:

Different phases of this litigation have heretofore been in the federal courts. The case was here once before on a question not now involved in this appeal and was remanded to the district court for further proceedings.[1] On remand the district court made necessary findings of fact and stated its conclusion that both Vance Trucking Company (Vance) and Forrester Trucking Company (Forester), and their insurers, must defend in a tort action in the district court which precipitated this controversy.[2] Since the district court there stated the facts in detail it is unnecessary to restate them fully here. However, a very short statement of undisputed facts is included herein in order to acquaint the reader with the general nature of the litigation.

At all times pertinent hereto Forrester was a licensed trucking company with an office and a terminal at Sumter, South Carolina, and was engaged primarily in hauling with its own motor vehicles certain commodities within South Carolina under authority of the South Carolina Public Service Commission. During slack seasons Forrester leased vehicles to Vance for use in interstate hauling, Vance being licensed to operate interstate under authority of the Interstate Commerce Commission. Vance had its main office at Henderson, North Carolina, and maintained a terminal and dispatcher at Lake City, South Carolina. Forrester was the named insured in a liability policy issued by Canal Insurance Company (Canal) with limits of $100/$300,000. Vance was the named insured in a liability policy issued by Allstate Insurance Company (Allstate) with limits of $500/$500,000.

During the summer of 1962 Vance and Forrester entered into a lease agreement whereby Forrester was to furnish tractor-trailer trucks and drivers to Vance for its use in hauling commodities for Vance's own customers. The leased vehicles operated primarily out of Vance's

[1] Vance Trucking Company v. Canal Insurance Company, 338 F. 2d 943 (4 Cir. 1964).

[2] Vance Trucking Company v. Canal Insurance Company, 249 F. Supp. 33 (D. S. C. 1966).

terminal at Lake City with drivers furnished by Forrester and who were approved by Vance according to the terms of the lease agreement.

Sammie Burgess, an uneducated Negro then fifty years old, was one of Forrester's drivers. On October 3, 1962, Vance's dispatcher in Lake City called Forrester's office and asked that a driver be sent to the terminal the following morning to transport a load of tobacco to Fairmont, North Carolina. Pursuant to this request Burgess, who had been driving the leased vehicles for Vance on other occasions, reported to the dispatcher, picked up a loaded tractor-trailer unit which was already in Lake City. After delivering the cargo in Fairmont, Burgess returned to Lake City and was instructed by Vance's dispatcher to take the tractor and an empty trailer to Forrester at Sumter. On the way to Sumter the vehicle operated by Burgess was involved in an accident in which Mrs. Barbara Carson was killed and her husband and four children were injured.

Upon consideration of all the facts and circumstances the district court determined that, at the time of the accident, Burgess was then and there the agent and servant of both Vance and Forrester; that both Vance and Forrester were responsible for the acts of Burgess; and that Vance and Forrester, and their insurers, must defend in tort actions brought on behalf of the Carsons.[3] The question of "proportionate pecuniary responsibility" had not been presented and the court rendered no decision with respect thereto at that stage of the proceedings. Since we conclude that the factual findings are supported by substantial evidence we cannot say that they are clearly erroneous. Permissible inferences and conclusions were drawn from the facts as found and we affirm that portion of the decision below as reported at 249 F. Supp. 33.

Subsequent to the initial determination with respect to the tort liability of Vance and Forrester the plaintiffs, Vance and Allstate, and the defendants, Forrester and Canal, moved that the order and judgment of the district court be supplemented, altered or amended by determining the questions of insurance coverage. Thereafter the dis-

[3] 249 F. Supp. 33, cited n. 2 *supra*.

trict court held that Allstate was pecuniarily responsible for five-sixths of the amount of any judgments obtained by the Carsons growing out of the accident, and that Canal would be pecuniarily responsible for one-sixth of the amount of any such judgments. *Vance Trucking Company v. Canal Insurance Company,* 251 F. Supp. 93, (D. S. C. 1966).

Assuming, *arguendo,* the correctness of the district court's determination that both Vance and Forrester were responsible for the acts of Burgess, Allstate contends that Canal's coverage is primary and protects Allstate's named insured (Vance), Canal's named insured (Forrester), and Burgess, the driver. Canal urges pro rata liability in asking for a determination of "proportionate" pecuniary responsibility of the parties. Both Allstate and Canal rely upon various policy provisions, inclusions and exclusions, in an effort to support their contentions.

The district court stated that a construction of the insurance policies was necessary and that the issue as to the liability coverage must be determined from the contractual intent and objective of the parties as expressed in their policies and applicable endorsements. The court concluded that by reason of the respective policy provisions neither policy covered Burgess at the time of the accident.

Allstate's endorsement 14-B provides that the policy does not apply to persons, their agents or employees, engaged in transporting property for Vance "unless the accident occurs while such automobile is being used exclusively in the business of the named insured." The "other insurance" clause in the Allstate policy provides that if the insured, Vance, had "other insurance against a loss covered by this policy the Company [Allstate] shall not be liable under the policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance."

The district court found that the vehicle involved in the accident was not being used *exclusively* in the business of Vance, Allstate's named insured, and that neither Burgess nor Forrester was covered by the Allstate policy.

Canal's policy, in which Forrester is named insured, contains an exclusion clause which provides that no coverage is extended to "any person, firm or organization using the described automobile pursuant to any lease, contract of hire, bailment, rental agreement, or any similar contract or agreement either written or oral, expressed or implied." This policy further provides that when the automobile described therein is being used pursuant to a lease "the insurance afforded the named insured [Forrester] shall be excess insurance over any other insurance." The court found that Burgess was operating the accident vehicle pursuant to the lease agreement and, consequently neither Burgess nor Vance was covered by the Canal policy.

At 251 F. Supp. 93, 96, the court stated:

> "There is no reasonable, plain and ordinary interpretation which may be applied to either policy to justify a finding that either insurer owes protection to anyone other than its named insured. This is not a case in which conflicting 'other insurance' clauses are to be resolved. In those cases the controversy most often arises where there is a duplication of coverage."

Following an extended discussion of "other insurance" policy provision, the court continued:

> "The problems of 'other insurance' are but an enlightening adversion here, however, for we are not faced with such a problem. The applicable endorsements effectively negate duplicated coverage. Neither trucking company can claim coverage under any policy other than that in which it is the named insured. We have two separate lines of coverage which, in this instance, happen to reach a single act. There is a duality of coverage without a duplication. Each trucking company is concurrently liable and each must look to his own insurer. It follows that the measure of each insurer's response must be proportional to the amount of

coverage each has provided. It does not appear that a factual situation sufficiently analogous to lend guidance has been decided by the courts, but, ultimately, the situation is not wholly dissimilar to the 'other insurance' situation, and the result would be no different had there been a true duplication of coverage. By what is perhaps the majority view neither of the two 'excess' clause would be preferred and there would be required a proration. * * *. There is no other rational basis of application than a pro rata response." 251 F. Supp. at 98.

The district court considered several cases which had been cited by Allstate as providing the answer to the controversy here. Upon analysis the court found those cases distinguishable, inapposite, and dispositively unpersuasive.

Further assuming, *arguendo*, on this appeal that Forrester and Vance are liable to the third parties involved in the accident and that Burgess was not covered by either policy, Allstate contends that the liability of both insurance companies sounds in contract rather than tort. It then points to a decision of the Supreme Court of South Carolina, which was handed down only a few days before the district court's decision as to proportionate pecuniary responsibility, which was not considered by the district court. The South Carolina case is *Galloway v. Southern Farm Bureau Ins. Co.*, 247 S. C. 288, 147 S. E. 2d 271 (March 1, 1966). Allstate urges that the *Galloway* case supports its contention that the prorating of the liability of the insurance companies in the circumstances here is error. That case involved a suit by Galloway, a passenger in a vehicle owned by L. C. Tolson, which was in possession of the owner's son, Darrell Tolson, with his father's consent. In turn, Darrell Tolson permitted Reymond Wilkes to drive and while the latter was negligently operating the vehicle it was involved in an accident resulting in injury to Galloway. Galloway was paid $10,000, the limit under the L. C. Tolson policy which covered the particular vehicle. He obtained a $100,000 judgment against Raymond Wilkes. At the time of the accident there were in force two policies of automobile liability insurance that had been issued by

Southern Farm Bureau Insurance Company to Raymond Wilkes' father, C. A. Wilkes. The policies were identical in form. One policy covered a 1958 Ford sedan and the second policy covered a 1953 Chevrolet truck, both vehicles being owned by C A. Wilkes, and the liability under each policy was limited to $10,000 for injury to any one person and $20,000 for each accident. Galloway obtained a judgment against the said insurance company on the policy covering the 1958 Ford, which judgment was paid with interest. Galloway then brought an action against the insurer for $10,000 and obtained a judgment for that amount under the policy covering the Chevrolet truck to be applied against the $100,000 judgment against Raymond Wilkes.

The insurance company appealed and the judgment was affirmed. The controversy on appeal in *Galloway* concerned a clause as to "other insurance" contained in the policy upon which the second $10,000 judgment was obtained. This clause provided that if the insured, C. A. Wilkes, had "other insurance" against a loss covered by the policy the insurer "shall not be liable under this policy for a greater portion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; **provided, however, the insurance with respect to * * * other automobiles shall be excess insurance over any other valid and collectible insurance.**" (Emphasis supplied.)

In *Galloway,* the insurance company contended that since the insured, C. A. Wilkes, had other insurance (the policy covering the 1958 Ford) against the loss, the insurer's liability under the Chevrolet policy had been discharged by the payment of the $10,000 judgment on the Ford policy. The court observed that this contention obviously was based upon the unsound premise that the "loss" to which the two policies were applicable did not exceed $10,000. Galloway contended that the insurer's liability here is controlled by the proviso appearing at the end of the "other insurance" clause. The South Carolina court held that the quoted proviso was not ambiguous, and was clearly applicable. "The loss to which the policy is applicable, *i.e.,* the

plaintiff's judgment in the amount of $100,000.00, exceeds the amount of all other insurance against such loss; the driver of the automobile, whose recklessness caused the loss, was an 'insured' under the policy; the driver was operating an automobile other than that of the named insured, C. A. Wilkes, described in the policy, and by the plain language of the proviso relating to such other automobiles the coverage is 'excess insurance.'" 147 S. E. 2d at 273.

Having reached a decision, the court extended its discussion and Allstate points to the following quotation as particularly apposite to the instant case. It was stated, 147 S. E. 2d at 273:

> "Appellant [insurer] may not, and indeed does not, invoke the pro-rata provision of the 'other insurance.' clauses *with respect to Tolson's policy,* because that policy was the primary coverage and liability thereunder was not on a parity with liability under appellants' policy, which was excess insurance, was not identical in scope with the former, and did not come into operation until the former had been exhausted. *Co-insurance of the same risk is prerequisite to the right of contribution among insurers.*'" (Emphasis supplied.)

The only South Carolina case cited in support of the italicized portion of the foregoing quotation is the case of *Laurens Federal Savings & L. Ass'n, v. Home Ins. Co. of New York,* 242 S. C. 226, 227, 130 S. E. 2d 558. In view of the statement that the insurance company did not invoke the pro rata provision of the "other insurance" clauses, the court's subsequent comments would appear to be no more than dicta. The court stated that the pro rata provision would not apply because the policies were not "identical" in scope, Tolson's was the primary policy, and the two policies issued to Wilkes were secondary. It was at this juncture that the court made its statement that coinsurance of the same risk is a prerequisite to the right of contribution.

Coinsurance problems have usually arisen in South Carolina cases involving fire insurance policies issued to

parties with differing interests, such as mortgagor and mortgagee. In such instances the South Carolina Supreme Court has held that an insurer who had issued a policy to a party having only an equitable interest had no right of contribution from the insurer of the legal interest. *Laurens Fed. Sav. & L. Ass'n. v. Home Ins. Co., supra; Murdaugh v. Traders & Mechanics Ins. Co.*, 218 S. C. 290, 62 S. E. 2d 723 (1950); but see *Edwards v. Great American Ins. Co.*, 234 S. E. 404, 108 S. E. 2d 582 (1959). However, where the same party in interest has procured several fire insurance policies covering the same risk proration will be permitted, provided the insured has otherwise complied with the terms of the policies. *Wynn v. Caledonian Ins. Co.*, 100 S. C. 47, 84 S. E. 306 (1915); *Cave v. Home Ins. Co.*, 57 S. C. 347, 35 S. E. 577 (1900). See *Graham v. American Eagle Fire Ins. Co.*, 182 F. 2d 500 (4 Cir. 1950).

In the instant case we are of the opinion that there was the equivalent of coinsurance of the same risk insofar as Allstate and Canal are concerned. The requirement for contribution is that the insurers must have insured the same risk and interest, or, as it has been stated, there must exist a common liability upon the same obligation. 29A Am. Jur., *Insurance* § 1718, p. 796. Here there is a common liability shared by Vance and Forrester and, by the same token, by Allstate and Canal. The policies here involved were issued to protect the respective trucking companies against claims such as those arising out of the accident. In this respect both policies insure the same risk against the same event. The anomaly here arises from the fact that Burgess, the agent and servant of both of the insureds, was not covered by either contract of insurance at the time of the accident. However, both Vance and Forrester are liable in tort for the injuries caused by Burgess and each policy protects the insured named therein against all sums which it is legally obligated to pay within policy limits. Since Vance has contracted for greater protection, its insurer, Allstate, is liable in proportion to the amount which the protection it provided bears to the total protection provided by both policies.

Affirmed.

ORDER DENYING PETITION FOR REHEARING

Upon consideration of the Petition for Rehearing filed by the appellants, Vance Trucking Company, Inc., and Allstate Insurance Company, on May 31, 1968, it is

ORDERED that the petition be, and the same is hereby, denied.

FILED
June 20, 1968

SAMUEL W. PHILLIPS,
Clerk

s/ SIMON E. SOBELOFF,
United States Circuit Judge,

s/ HERBERT S. BOREMAN,
United States Circuit Judge.

A True Copy, Teste:
SAMUEL W. PHILLIPS, Clerk,
By: BEVERLY M. NEWELL,
Deputy Clerk

ORDER STAYING MANDATE

Upon the motion of the appellants by their counsel, and for cause shown,

It is ordered that the mandate in the above case be, and it is hereby, stayed pending application of the appellants for a *writ of certiorari* to this Court, provided the application is filed in the Supreme Court of the United States within 30 days from June 20, 1968.

s SIMON E. SOBELOFF,
United States Circuit Judge.

FILED
June 27, 1968,

SAMUEL W. PHILLIPS,
Clerk

A True Copy, Teste:
SAMUEL W. PHILLIPS, Clerk,
By: MARGARET L. DAVIS,
Deputy Clerk

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Charles E. Simons, Jr., United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, Robert H. Carson, Administrator of the Estate of Annie Barbara Carson, deceased, recover of the defendants, Vance Trucking Lines, Inc., and Forrester Trucking Company, Inc., the sum of Eighty Five Thousand and no/100 ($85,000.00) dollars, actual damages.

Dated at Greenville, South Carolina, this 19th day of June, 1968.

MILLER C. FOSTER, JR.,
Clerk of Court,

By: EDITH W. THOMAS,
Deputy Clerk.

Office-Supreme Court, U.S.
FILED
AUG 19 1968
JOHN F. DAVIS, CLERK

Supreme Court of The United States

OCTOBER TERM, 1968

NO. 318

VANCE TRUCKING COMPANY, INC., and
ALLSTATE INSURANCE COMPANY,

Petitioners,

versus

CANAL INSURANCE COMPANY, FORRESTER TRUCKING COMPANY, INC., HERBERT FRANCIS CARSON, SCOTT CARSON, SUSAN CARSON, DAVID CARSON, CHRISTOPHER CARSON, and ROBERT H. CARSON, Administrator of the Estate of Annie Barbara Carson, Deceased,

Respondents.

BRIEF OF RESPONDENTS CANAL INSURANCE COMPANY AND FORRESTER TRUCKING COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

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CANAL INSURANCE COMPANY, FORRESTER TRUCKING COMPANY, INC., HERBERT FRANCIS CARSON, SCOTT CARSON, SUSAN CARSON, DAVID CARSON, CHRISTOPHER CARSON, and ROBERT H. CARSON, Administrator of the Estate of Annie Barbara Carson, Deceased,

Respondents.

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OPINIONS BELOW

The orders of the District Court dated January 6, 1966 and March 9, 1966 are reported at 249 F. Supp. 33 and 251 F. Supp. 93. The decision of the Fourth Circuit Court of Appeals, dated May 7, 1968, and the denial of a re-hearing by that Court, dated June 20, 1968, are not yet reported. The decisions by the Fourth Circuit, respectively, are printed at pages 24 and 42 of the petitioners' appendix.

QUESTIONS PRESENTED

I

Is the decision of the Fourth Circuit Court of Appeals, requiring proration of insurance between Allstate and Canal, in conflict with the law of the State of South Carolina?

II

Does the decision of the Fourth Circuit Court of Appeals amount to an impairment of the obligations of a contract between Allstate and its insured and, if so, is such prohibited by the Constitution of the State of South Carolina?

STATEMENT OF CASE

Respondents adopt the statement of the case set forth by petitioners to the extent that it represents a statement of the proceedings here but not to the extent that it sets forth petitioners' arguments and implications. Furthermore, respondents object to the implication by the petitioners that multiple claims are now in litigation. Only one suit has been filed.

ARGUMENT

I

Respondents oppose the petition for certiorari because, taken as a whole, it represents no more than an attempt by petitioners to have yet another review of the merits of this controversy.

Petitioners have been resourceful in the continuing presentation of legal theories. We say "continuing" because at each stage of the trial and appellate procedures petitioners have seemingly adopted at least one new theory to demonstrate the error of a prior determination. Examples of this are most easily recognized in their use of newly decided cases. When before the Fourth Circuit Court of Appeals for review, petitioners presented, for the first time, their argument that co-insurance of the same risk is prerequisite to contribution among insurers in South Carolina, citing *Galloway v. Southern Farm Bureau*

Insurance Company.[1] After an adverse determination by the Fourth Circuit on May 7, 1968, petitioners, in seeking a rehearing before that Court, urged another new theory, that enforcement of the Court's decision would amount to a prohibited impairment of a contract, in derogation of the Constitution of the State of South Carolina, Article I, Section 8, citing *Travelers Insurance Company v. Allstate Insurance Company.*[2]

Petitioners sedulously foster myopic legal theories, caused solely by their failure to consider with equal diligence the merits of the reverse side of the coin, moreover, to recognize even that there may be another side.

In the course of its opinion, the District Court reviewed an impressive body of jurisprudence dealing with multiple insurance coverages and conflicting insurance clauses,[3] and arrived at the conclusion that there were "two separate lines of coverage which, in this instance, happen to reach a single act. There is a duality of coverage without a duplication."[4] Based on that situation, the court held that since Vance and Forrester, the two trucking companies, were concurrently liable, each should respond in proportion to its coverage.

The basis of petitioners' continuous complaint, however, is couched in the determination by the District Court that the driver of the tractor-trailer unit involved in the accident (which, though owned by Forrester Trucking Company, was under lease to Vance Trucking Company) was not insured under the policy of either Allstate or Canal. Common logic demands recognition that such a result was not intended by either insurance company. Each intended to furnish coverage to the driver up to the time when he became covered by another policy. It was never envisioned, nor intended, that the driver, obviously about someone's business, would be left completely uninsured.

The determination by the District Court is only unique

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[1] 247 S.C. 288, 147 S.E.2d 271 (1966).
[2] 249 S.C. 592, 155 S.E.2d 591 (1967).
[3] *Vance Trucking Co. v. Canal Ins. Co.*, 251 F. Supp. 93, 96-98 (D. S.C. 1966), set out on pages 28-31 of Petitioners' appendix.
[4] *Id.* at 98.

in its holding that, in an operation replete with coverage, the driver, the one involved in the accident, had none. The incongruity of the situation is seen in the fact that if the driver had been hauling for either of the trucking companies solely and had no connection with the other he would have had coverage, yet, because he was working for both at the same time, he was uninsured.

The resolution of the dilemma posed by the paradox of no coverage was the District Court's determination that the two insurance companies would have to pro-rate any loss in direct proportion to their respective coverages. This determination was reached only after a review of massive jurisprudence dealing with like situations.

Even a cursory review of the District Court's opinion will amply demonstrate that, far from being oblivious to petitioners' contract rights, the court was perhaps overly zealous in trying to delineate the conflicting coverages and exclusions in both policies. It is this zealous effort which has given rise to petitioners' complaint now that pro rata contribution is improper since there was no common insured. Perhaps the District Court should have declared the exclusions of the two policies mutually repugnant, disregard them, and required pro rata contribution. Such would have been clearly allowable under the jurisprudence of this country.[5]

Obiter dictum in *Galloway v. Southern Farm Bureau Insurance Company*,[6] is used by petitioners as if it were the ultimate declaration of the law of South Carolina on contribution between insurers. The rule regarding contribution did not receive application in the *Galloway* decision. Truly, as decided in that case, the "excess" policies of Southern Farm, which afforded omnibus coverage to Wilkes, did not insure the same risk as the policy which was written by another company on

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[5]*Citizens Mut. Auto Ins. Co. v. Fireman's Fund Ins. Co.*, 234 F. Supp. 931 (W.D. Mich. 1964); *Truck Ins. Exch. v. Torres*, 193 Cal. App. 2d 483, 14 Cal. Rptr. 408 (1961); *Economy Fire & Cas. Co. v. Western States Mut. Ins. Co.*, 49 Ill. App. 2d 59, 198 N.E.2d 723 (1964); *Farmers Ins. Exch. v. Fidelity & Cas. Co.*, 374 P.2d 754 (Wyo. 1962); 7 Am. Jur. 2d, *Automobile Insurance* §202, at 545. See also, *Vance Trucking Co. v. Canal Ins. Co.*, 251 F. Supp. 93 (D.S.C. 1966), for cases cited therein.

[6]*supra*, note 1.

the Tolson vehicle. Perhaps the Supreme Court of South Carolina should have defined "risk," since we interpret that to mean the hazard that an insured vehicle may be operated in such a manner that an accident may occur and liability may be encountered.

There was co-insurance of the same risk in this case so far as Allstate and Canal were concerned. The right of contribution between insurers exists as "an equitable rule and is based on the fact that those who insure or become sureties for the same duty ought to share the results of the default."[7] The single *risk* insured against by both Allstate and Canal was that the vehicle being operated by the common servant of their insureds would be involved in an accident and expose their insureds to liability. Both policies of insurance covered the tractor-trailer unit here. "Risk," we submit, may be used as if synonymous with "accident," thus requiring contribution, within the meaning of the rule, because there was co-insurance of the same accident.

The District Court decision that there must be proportionate contribution to any loss was a considered one, was based upon the resolution of an impasse created by the conflicting exclusions of the insurance policies, and was clearly consonant with the law of the State of South Carolina.

II

If we understand the petitioners' treatment of their subsidiary question (our Question II), as this treatment is based upon their construction of *Travelers Insurance Company v. Allstate Insurance Company*,[8] their argument is thus:

Vance Trucking Company and Forrester Trucking Company are joint tort-feasors. Under the law of South Carolina, there may be no judicially enforced contribution between joint tortfeasors. Allstate is obligated to do no more and to pay no more than its insured would have to pay if insurance were not in issue. Neither Vance nor Forrester could compel contri-

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[7] *Lucas v. Garrett*, 209 S.C. 521, 527, 41 S.E.2d 212, 215 (1947); See also, *Cooper v. Georgia Cas. & Sur. Co.*, 244 S.C. 286, 136 S.E.2d 744 (1964).

[8] *supra*, note 2.

bution from the other if a plaintiff collected the total amount of a judgment from either. To require Allstate to pay more is to infringe upon its contractual rights.

On the basis of these assertions, whether explicit or implicit in their argument, the petitioners found their claim that the decision by the District Court, affirmed by the Fourth Circuit, impairs the obligations of the contract of insurance.

The petitioners are wrong on two counts. First, they err in assuming that Vance and Forrester are joint tort-feasors; they are not. Second, they err in assuming that the decision would amount to a constitutionally prohibited impairment of a contract; it would not. We will develop these theories in that order.

A. Joint Tort-Feasors.

In urging the relevance of the *Travelers* case, a 3-2 decision, petitioners imply that here, as in *Travelers*, we have a case involving joint tort-feasors. The cases are readily distinguishable.

In the *Travelers* case, the negligence or gross negligence of *three separate drivers*, operating *three separate vehicles*, caused injury to a guest passenger in one vehicle. There were truly three tort-feasors. Three separate individuals, each through negligence of his own and independent of the negligence of any other person, caused the plaintiff's injuries.

Here, there was only one tort-feasor, the negligent driver of the tractor-trailer unit. The District Court held, and Allstate no longer contests, that the driver was the agent and servant of both Vance and Forrester — two masters, one servant. The legal fiction created by the doctrine of *respondeat superior* does no more than make a master, or masters, responsible and answerable for a servant's delicts. That doctrine does not transform the master into the actual tort-feasor. If it did, the master would have to answer to criminal charges if the servant's fault in an accident also constituted a crime. If, as in the *Travelers* decision, we had two or more actual tort-feasors, there might be reason to consider petitioners' argument (if the Court could ignore that there was no reason for the rule in the *Travelers* case). In the absence of joint tort-feasors,

however, petitioners' argument is an experiment in syllogism. None of its premises is relevant.[9]

B. Impairment of Contracts.

Initially, we draw additional attention to a matter given only superficial treatment by petitioners, the issue whether the constitutional limitation even applies to the judiciary. This court has held that Article I, Section 8 of the United States Constitution is directed only to impairment by legislation, not to impairment by judgments of the courts.[10] Though the South Carolina Supreme Court set for itself a self-imposed limitation, that limitation was not required by Article I, Section 8 of the Constitution of South Carolina. Yet, petitioners use this self-imposed limitation to urge that, consonant with the *Erie* doctrine, the federal courts are bound or limited in like manner. If the federal courts were so bound, it would have to be because the South Carolina Constitution required it. It is not so required, and there is no cogent reason why this Court should follow a limitation which the South Carolina Supreme Court adopted without necessity.

Partially aside from and partially in keeping with the above consideration, we submit that, as a matter of historical development, there is no reason to impose Article I, Section 8 of either the South Carolina or the United States Constitution upon the courts. In delivering the opinion of the court in *Home Building & Loan Association v. Blaisdell*,[11] Chief Justice Hughes developed the history of Article I, Section 8 of the Federal Constitution. He pointed out that Article I, Section 8 had its origin in conditions prevalent after the Revolutionary War, conditions which saw the various states, through legislative schemes, defeat the payment of honest debts and infringe on the obligations of contracts.

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[9]By analogy, the situation here is not different from that where two individuals, each holding a policy of insurance, are joint owners of a truck and send the truck and a driver out on a mission during which an accident occurs. The only logical payment by the insurers for the joint owners-masters would be a prorated one.

[10]*Barrows v. Jackson*, 346 U.S. 249 (1953); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924).

[11]290 U.S. 398 (1934).

In comparison, since our courts only consider legal or equitable matters which either already exist or, in the case of declaratory actions, will exist between litigants, there is no reason to believe that judicial processes will lead to the conditions which prompted the enactment of Article I, Section 8. Our research has not disclosed a case in which this Court has held that some action by the judiciary has amounted to a violation of Article I, Section 8.

Finally, and even if the constitutional proscription were applicable to the courts, there was no impairment of the petitioners' contract by the decisions here. As stated heretofore, the District Court made a diligent effort to reconcile the conflicting insurance clauses in this case, even to the point that it became obvious that an unintended result would occur; the actual tort-feasor, the driver, would have no coverage because he was the servant of two masters. Many courts have refused to engage in the verbal gymnastics which are required to attempt a reconciliation of conflicting insurance clauses which first give then take away the very protection purchased. The District Court considered all those cases. Can if be said that the courts in those cases as well as the court here impaired the contracts of insurance involved? It cannot, not unless the courts are required to be fatuous when an ordinary man would not.

If considerations by this Court of Article I, Section 8, of the Federal Constitution might be used as comparative analogies to what should be said regarding the South Carolina Constitution, guidelines might be found in the following:

> The Constitution is "intended to preserve practical and substantial rights, not to maintain theories."[12]
>
> The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them . . .[13]
>
> For it is not every modification of a contractual promise that impairs the obligations of a contract

[12] *Faitoute Iron and Steel Co. v. City of Asbury Park, N.J.*, 316 U.S. 502, 514 (1942).

[13] *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 431 (1934).

under federal law, any more than it is every alteration of existing remedies that violates the Contract Clause[14]

Our courts have always been able to amend, modify or abridge rights and remedies set up by contract or agreement; this is a major function of our judiciary. Shall the courts be held to a strict enforcement of contracts which are unconscionable, usurious, contrary to public policy?

The District Court, aside from its assiduous consideration of policy rights and obligations, appropriately balanced the equities of this case. There were two insurance coverages available, one, that of the petitioner, Allstate, much larger than the other. For a greater amount of premium, Allstate must assume a greater portion of the damages. This was the protection purchased.

CONCLUSION

The District Court and the Fourth Circuit Court of Appeals correctly applied the law applicable to this case. The decision does not abrogate any substantive rule of law declared by the South Carolina Supreme Court. It does not constitute a prohibited impairment of the obligations of a contract; it does not even fall within the purview of that constitutional safeguard. Certiorari should be denied.

Respectfully submitted,
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Of Counsel

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[14] *City of El Paso v. Simmons*, 379 U.S. 497, 506-507 (1965).